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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ROBERT McADAM,

12 Plaintiff,

13 v.

14 STATE NATIONAL  
15 INSURANCE COMPANY, INC.,

16 Defendant.

CASE NO. 12cv1333-BTM (MDD)

ORDER GRANTING  
PLAINTIFF'S MOTION TO  
COMPEL BETTER RESPONSES  
TO DISCOVERY

[ECF NO. 32]

17 On September 3, 2013, Plaintiff filed the instant Motion to Compel  
18 Better Responses to Discovery. (ECF No. 32). Defendant responded in  
19 opposition on September 18, 2013. (ECF No. 37). The Court held a  
20 hearing on the motion on September 27, 2013. (ECF No. 39). Following  
21 the hearing the Court ordered as follows:

22 (1) Defendants shall review all documents, currently withheld,  
23 listed in any privilege log previously provided to Plaintiff. On  
24 or before October 2, 2013, Defendants shall produce any  
25 document previously withheld for the protection of work  
26 product, and any document that upon review Defendants  
27 deem are not subject to privilege. Defendants will, at that  
28 time, also produce a revised privilege log listing any  
documents that they intend to continue to withhold. (2) On  
October 7, 2013, Parties shall meet and confer regarding any  
documents that are not produced by Defendants on October 2.  
(3) Any document produced either formally, or informally at  
the meet and confer, will be subject to Fed. R. Evid. 502(d).  
Thus, any document produced will not constitute a waiver of  
privilege. (4) Should a dispute remain, regarding withheld

1 documents, the Parties shall file a joint motion regarding such  
2 dispute on or before October 14, 2013. (5) Any documents that  
3 remain in dispute shall be delivered to chambers for in  
4 camera review on October 15, 2013.

(*Id.*)

5 On October 15, 2013, the parties filed a joint brief regarding items  
6 remaining in dispute. (ECF No. 40). Defendant submitted to chambers  
7 for *in camera* review documents withheld from production. Defendant  
8 asserted attorney-client privilege for some documents and also withheld  
9 documents regarding its re-insurance policy and policy reserves as  
10 “proprietary” and based upon relevance. On October 16, 2013, the Court  
11 held a telephonic conference with counsel for the parties inviting  
12 additional briefing regarding the withholding of the remaining  
13 documents. On October 28, 2013, each party submitted additional  
14 briefing. (ECF Nos. 42, 43).

15 At this juncture, Defendant has agreed to produce the policy it  
16 holds with its re-insurer, Wind River Reinsurance Company, agreed to  
17 produce reports between its claims administrator, Optimum Claims  
18 Service, Inc., and Wind River, and agreed to produce Optimum’s claim  
19 handling guidelines. (ECF No. 43). Defendant redacted from the reports  
20 between Optimum and Wind River information regarding loss reserves.  
21 Defendant continues to assert attorney-client privilege for  
22 communications between it and attorneys from the law firm of Gordon &  
23 Rees, LLP, and between Gordon & Rees and marine surveyor Arnold &  
24 Arnold.

25 What remains is for the Court to rule upon the propriety of the  
26 assertion of attorney-client privilege regarding the withheld  
27 communications and the propriety of the withholding of information  
28 regarding the reserve established by Wind River regarding Plaintiff’s

1 claims.

## 2 Factual Summary

3 The following factual summary is from the Order of District Judge  
4 Barry Ted Moskowitz, on Defendant's Motion for Judgment on the  
5 Pleadings.

6 This action arises out of a "Hull and  
7 Machinery/Protection and Indemnity" Policy ("Policy") issued  
8 by Defendant to Plaintiff Robert McAdam for the term May 5,  
9 2011 to May 5, 2012.

10 Plaintiff is the owner of the vessels Jessica M and  
11 Shirley B, both of which are insured under the Policy. In late  
12 2011, Master Marine, Inc. ("MMI"), in Bayou La Batre,  
13 Alabama, performed repairs and upgrades on Jessica M and  
14 Shirley B to convert the vessels from shrimp trawlers to deep  
15 sea fishing boats. The repairs included work on the vessels'  
16 rudder and shaft assemblies.

17 On February 24, 2012, Shirley B's rudder snapped off  
18 while the vessel was fishing near New Zealand. Jessica M,  
19 which was 70 miles away, came to provide assistance and  
20 towed Shirley B to port in Tauranga, New Zealand. Defendant  
21 directed the Shirley B to a repair yard in Whangarei, New  
22 Zealand.

23 Repairs totaling \$162,283.74 were made on the Shirley  
24 B. Defendant's surveyor determined that the loss of the  
25 rudder was caused by faulty work of MMI. Defendant  
26 reimbursed Plaintiff \$114,375.07 for the repairs, deducting  
27 amounts for repairs that it deemed betterment.

28 The Jessica M also underwent repairs in New Zealand.  
The Captain of the Jessica M noticed "play" in the rudder  
while towing the Shirley B, and according to Plaintiff,  
subsequent testing and inspection showed that Jessica M  
suffered from the same repair defects as the Shirley B – i.e.,  
welds that were not full-penetration and provided no strength  
or stability to the rudder area.

When Plaintiff tendered a claim for the repair of Jessica  
M, Defendant denied coverage. Defendant took the position  
that the "play" in the rudder was due to lack of maintenance  
of the rudder stock and bearings, not faulty welds.

(ECF No. 9). It appears the claim was denied in May 2012. Plaintiff filed  
suit on June 4, 2012. (ECF No. 1).

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## Attorney-Client Privilege

### Legal Standard

The Ninth Circuit consistently has described the attorney-client privilege as protecting communications: (a) where legal advice of any kind is sought; (b) from a professional legal advisor in his capacity as such; (c) relating to that purpose; (d) made in confidence; (e) by the client; (f) that are at the client's insistence permanently protected; (g) from disclosure by himself or the legal advisor; (h) unless the protection be waived. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). The party asserting the privilege has the burden of establishing all of its elements and, even if established, the privilege is strictly construed. *Id.* at 999-1000.

In *Ivy Hotel San Diego, LLC v. Houston Casualty Co.*, 2011 WL 4914941, \*3-4 (S.D.Cal. 2011), District Judge Sabraw of this Court described the manner in which state law governing privilege is applied in a federal court sitting in diversity, stating:

In a federal action based on diversity jurisdiction, state law governs attorney-client privilege claims. Fed.R.Evid. 501; *Star Editorial, Inc. v. United States District Court for the Central District of California (Dangerfield)*, 7 F.3d 856, 859 (9th Cir.1993); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 284 (C.D.Cal.1998). Under California law, "evidentiary privileges such as the attorney-client privilege are governed by statute. *HLC Props., Ltd. v. Superior Court*, 35 Cal.4th 54, 59, 24 Cal.Rptr.3d 199, 202, 105 P.3d 560 (2005); *Moeller v. Superior Court*, 16 Cal.4th 1124, 1129, 69 Cal.Rptr.2d 317, 320, 947 P.2d 279 (1997). California Evidence Code section 954, confers a privilege on the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.... Cal.Evid.Code § 954. "Confidential communications include information transmitted between attorney and client, and 'a legal opinion formed and the advice given by the lawyer in the course of that relationship.'" *Calvert v. State Bar*, 54 Cal.3d 765, 779, 1 Cal.Rptr.2d 684, 691, 819 P.2d 424 (1991) (quoting Cal. Evid.Code § 952). "The attorney-client privilege attaches to a

1 confidential communication between the attorney and the  
 2 client and bars discovery of the communication irrespective of  
 3 whether it includes unprivileged material.” *Costco Wholesale*  
 4 *Corp. v. Superior Court*, 47 Cal.4th 725, 734, 101 Cal.Rptr.3d  
 5 758, 219 P.3d 736 (2009). In determining whether the  
 attorney-client privilege attaches to communications,  
 California courts look to the “dominant purpose of the  
 relationship” between the client and the attorney. *Id.* at 739,  
 101 Cal.Rptr.3d 758, 219 P.3d 736.

6 “The party claiming the privilege has the burden of  
 7 establishing the preliminary facts necessary to support its  
 8 exercise, *i.e.*, a communication made in the course of the  
 9 attorney-client relationship.” *Id.* at 733, 101 Cal.Rptr.3d 758,  
 10 219 P.3d 736. “Once that party establishes facts necessary to  
 11 support a prima facie claim of privilege, the communication is  
 12 presumed to have been made in confidence and the opponent  
 13 of the claim of privilege has the burden of proof to establish  
 the communication was not confidential or that the privilege  
 does not for other reasons apply.” *Costco*, 47 Cal.4th at 733,  
 101 Cal.Rptr.3d 758, 219 P.3d 736 (citing Cal. Evid.Code §  
 917(a)); *Wellpoint Health Networks, Inc. v. Superior Court*, 59  
 Cal.App.4th 110, 68 Cal.Rptr.2d 844 (1997)).

14 As in *Ivy Hotel*, the Court must determine whether Defendant’s  
 15 “dominant purpose” in retaining Gordon & Rees was to receive legal  
 16 advice. The privilege would not apply if the dominant purpose was to  
 17 have Gordon & Rees provide business advice or act as a claims adjuster.  
 18 *Id.* at \*4. The answer may be that Defendant hired Gordon & Rees to  
 19 give legal advice and to act as a claims adjuster. In that case, the Court  
 20 must determine which purpose was primary. *Id.*

## 21 Analysis

22 In *Ivy Hotels*, Judge Sabraw had the benefit of declarations from  
 23 the attorney and the client regarding the fact and scope of the  
 24 engagement. *Id.* In the instant case, the Court requested declarations  
 25 from counsel regarding the fact and scope of the attorney-client  
 26 relationship between Gordon & Rees and its purported clients, Defendant  
 27 State National and maritime surveyor Arnold & Arnold. Defendant  
 28 acknowledged the Court’s request and stated that the necessary

1 declarations would be filed on October 15, 2013. (See ECF No. 40, p. 4, fn  
2 2). No such declarations were filed. Hundreds of pages of withheld  
3 documents, however, were provided to the Court for review.

4       Regarding Arnold & Arnold, the Court finds that Defendant has not  
5 carried its burden of establishing the preliminary facts necessary to  
6 support the exercise of the privilege. No evidence of an attorney-client  
7 relationship has been provided to the Court. In an abundance of caution,  
8 the Court reviewed the Arnold & Arnold documents submitted *in camera*.  
9 Arnold & Arnold is a maritime surveyor and adjuster. The  
10 communications between it and Gordon & Rees were predominantly  
11 regarding the investigation of Plaintiff's claims. Many of the  
12 communications were between Optimum, the claims administrator, and  
13 Arnold & Arnold in which Gordon & Rees merely was copied. The Court  
14 could not identify any documents or communications referring to a  
15 privileged relationship between Gordon & Rees and Arnold & Arnold.  
16 The Court has received no evidence nor found any documents suggesting  
17 that communications with Arnold & Arnold are protected by virtue of the  
18 attorney-client relationship between Gordon & Rees and Defendant State  
19 National. In communications with Plaintiff, some of which were  
20 contained within the withheld documents, Arnold & Arnold identified  
21 itself as an independent marine surveyor and adjuster assigned by the  
22 underwriter to investigate Plaintiff's claims. The assertion of  
23 independence belies the claim that Arnold & Arnold's activities could be  
24 subsumed within the attorney-client relationship between Gordon & Rees  
25 and Defendant State National.

26       Accordingly, the Court finds that all documents withheld from  
27 Arnold & Arnold based upon an assertion of attorney-client privilege are  
28 to be provided to Plaintiff. The privilege has not been established. As a



1 consequence, any such communications between Gordon & Rees and  
2 Defendant State National which were disclosed to Arnold & Arnold also  
3 must be provided to Plaintiff.

4       Regarding Defendant State National, the Court is satisfied that an  
5 attorney-client relationship existed with Gordon & Rees despite the fact  
6 that no supporting declaration was filed. Among the withheld documents  
7 are letters to counsel for Plaintiff in which Gordon & Rees claims to have  
8 been retained as coverage counsel for Defendant. Gordon & Rees is  
9 attorney of record for Defendant in this action. Other than that, there is  
10 no evidence presented regarding when the relationship commenced and  
11 scope of the engagement. The Court has reviewed the documents  
12 withheld on the basis of privilege to glean the “dominant purpose” of the  
13 engagement. If the dominant purpose of the engagement was claims  
14 adjustment, there is no privilege. *See Ivy Hotels* at \*4.

15       The Court finds that until the filing of this lawsuit, on June 4, 2012,  
16 the dominant purpose of the engagement between Gordon & Rees and  
17 Defendant State National was claims adjustment. Accordingly, all  
18 communications between Defendant State National and Gordon & Rees  
19 up to June 4, 2012, are not privileged and must be disclosed. The Court  
20 agrees that communications on and after June 4, 2012, exclusively  
21 between Gordon & Rees and Defendant State National are privileged and  
22 may continue to be withheld.

23       Many of the communications withheld by Defendant State National  
24 are between Gordon & Rees and Optimum Claims Service, Inc. -  
25 apparently the claims administrator used by Defendant State National.  
26 The Court is not aware of any expression by Gordon & Rees that it  
27 represents Optimum. The Court has not been provided any evidence nor  
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1 discovered any documents in its review reflecting that Optimum is a  
2 client of Gordon & Rees. There is no evidence that Optimum, as a claims  
3 administrator, is covered by any attorney-client relationship between  
4 Gordon & Rees and Defendant State National. Accordingly, the Court  
5 finds that documents withheld by Defendant State National which  
6 consist of communications withheld on the basis of privilege between  
7 Gordon & Rees and Optimum must be disclosed. Also, any  
8 communications withheld on the basis of privilege between Gordon &  
9 Rees and Defendant State National which includes representatives of  
10 Optimum similarly are not privileged and must be disclosed.

#### 11 Disclosure of Reserves

##### 12 Legal Standard

13 The Federal Rules of Civil Procedure generally allow for broad  
14 discovery, authorizing parties to obtain discovery regarding “any  
15 nonprivileged matter that is relevant to any party’s claim or defense.”  
16 Fed. R. Civ. P. 26(b)(1). Also, “[f]or good cause, the court may order  
17 discovery of any matter relevant to the subject matter involved in the  
18 action.” *Id.* Relevant information for discovery purposes includes any  
19 information “reasonably calculated to lead to the discovery of admissible  
20 evidence,” and need not be admissible at trial to be discoverable. *Id.*  
21 There is no requirement that the information sought directly relate to a  
22 particular issue in the case. Rather, relevance encompasses any matter  
23 that “bears on” or could reasonably lead to a matter that could bear on,  
24 any issue that is or may be presented in the case. *Oppenheimer Fund,*  
25 *Inc. v. Sanders*, 437 U.S. 340, 354 (1978). District courts have broad  
26 discretion to determine relevancy for discovery purposes. See *Hallett v.*  
27 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). Similarly, district courts have  
28



1 broad discretion to limit discovery where the discovery sought is  
 2 “unreasonably cumulative or duplicative, or can be obtained from some  
 3 other source that is more convenient, less burdensome, or less  
 4 expensive.” Fed. R. Civ. P. 26(b)(2)(C). Limits also should be imposed  
 5 where the burden or expense outweighs the likely benefits. *Id.*

6 A party may request the production of any document within the  
 7 scope of Rule 26(b). Fed. R. Civ. P. 34(a). “For each item or category, the  
 8 response must either state that inspection and related activities will be  
 9 permitted as requested or state an objection to the request, including the  
 10 reasons.” *Id.* at 34(b). The responding party is responsible for all items  
 11 in “the responding party’s possession, custody, or control.” *Id.* at 34(a)(1).  
 12 Actual possession, custody or control is not required. Rather, “[a] party  
 13 may be ordered to produce a document in the possession of a non-party  
 14 entity if that party has a legal right to obtain the document or has control  
 15 over the entity who is in possession of the document. *Soto v. City of*  
 16 *Concord*, 162 F.R.D. 603, 620 (N.D.Cal.1995).

### 17 Analysis

18 Defendant has withheld, on the basis of relevance, documents  
 19 reflecting loss reserves established in connection with Plaintiff’s claim. A  
 20 review of the cases reflects that the decision whether or not loss reserve  
 21 information is relevant in any given scenario depends upon the claims  
 22 asserted by Plaintiff. In *Bernstein v. Travelers Insurance Company*, 447  
 23 F.Supp.2d 1100 (N.D.Cal. 2006), the allegations were that Travelers  
 24 acted in bad faith by unjustifiably resisting claims and delaying  
 25 payments. Reviewing both federal and state law, the court determined  
 26 that loss reserve information may be relevant in determining the  
 27 subjective intent component of a bad faith claim. *Id.* at 1108. *Flintkote*  
 28

1 *Company v. Gernal Accident Assurance Company of Canada*, 2009 WL  
2 1457974 \*3 (N.D.Cal. 2009).

3 Defendant attempts to distinguish between first-party insurance  
4 disputes and third-party insurance disputes. The Court finds the  
5 distinction irrelevant in this case. Plaintiff's have sufficiently established  
6 that Wind River, the purported re-insurer in this case, is actually the  
7 front-line insurer. (See ECF No. 42 at 2).

8 The Court agrees with Plaintiff that his allegations of bad faith are  
9 virtually indistinguishable from the allegations made in *Bernstein* and  
10 *Flintkote*. Consequently, the Court finds that evidence regarding loss  
11 reserves established by Defendant and by Wind River are relevant and  
12 subject to disclosure.

### 13 Conclusion


14  
15 For the foregoing reasons, Plaintiff's Motion to Compel Better  
16 Responses is **GRANTED**. Absent further Order, Defendant is provide  
17 Plaintiff with the documents subject to disclosure under this Order no  
18 later than ten (10) days from the date of this Order.

19 As provided by Fed.R.Civ.P. 37(a)(5)(A), the Court is required to  
20 impose costs upon the party or attorney whose conduct necessitated the  
21 motion. The Court must provide an opportunity to be heard and must  
22 impose costs unless the Court finds that the successful movant brought  
23 the motion before attempting in good faith to resolve the dispute  
24 informally; the opposition to the motion was substantially justified; or  
25 other circumstances make an award of expenses unjust. *Id.* If Plaintiff  
26 decides to request that costs be awarded, an appropriate motion should  
27 be filed within fourteen (14) days of the date of this Order. The motion  
28 should contain the necessary documentation and declarations regarding

1 costs. Defendant may file an opposition no later than seven (7) days  
2 following the filing of the motion for costs.

3 IT IS SO ORDERED.

4 DATED: November 1, 2013  
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8 Hon. Mitchell D. Dembin  
9 U.S. Magistrate Judge  
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